BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK S. GRAY	)	
Claimant	)	
VS.	)	
	)	Docket No. 251,827
USCO DISTRIBUTION SERVICES	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant and respondent appeal the November 5, 2001 Award of Administrative Law Judge Robert H. Foerschler. Claimant was awarded an 18 percent permanent partial disability to the body as a whole based upon a functional impairment. He was, however, denied a work disability after the Administrative Law Judge found claimant had not put forth a good faith effort to find employment. Claimant was found to have violated the policies contained in Lowmaster v. Modine Mfg. Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998). The Appeals Board (Board) held oral argument on May 3, 2002.

APPEARANCES

Claimant appeared by his attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Stephen P. Doherty of Kansas City, Missouri.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

(1) Respondent contends claimant did not prove that he suffered accidental injury arising out of and in the course of his employment. Respondent, instead, citing Boeckmann v. Goodyear Tire & Rubber Co., 210 Kan. 733, 504 P.2d 625 (1972), contends that claimant's back problems are the result of the natural aging process as well as the normal activities of day-to-day living.

(2) Both claimant and respondent contest the nature and extent of injury and disability from the Award. The Administrative Law Judge awarded claimant an 18 percent whole body functional impairment based upon the opinion of Truett L. Swaim, M.D., board certified in orthopedic surgery, but denied claimant a work disability. Dr. Swaim found claimant to have suffered an 18 percent whole body functional impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Respondent contends that Dr. Swaim's opinion is highly inflated. Respondent also contends that the more credible opinion comes from respondent's expert, orthopedic surgeon David J. Clymer, M.D. However, claimant objects to Dr. Clymer's opinion, arguing he did not utilize the AMA Guides, Fourth Edition, as is required by K.S.A. 1999 Supp. 44-510e.

Respondent further contends claimant is not entitled to a work disability under K.S.A. 1999 Supp. 44-510e as claimant did not put forth a good faith effort to obtain employment after leaving respondent. Respondent argues that it was and is willing to accommodate claimant's restrictions and claimant's decision to terminate his employment violates the policies set forth in Lowmaster, *supra*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant was a senior stockman for respondent in its Lenexa warehouse. He had been an employee of respondent's since 1987. His responsibilities included driving a forklift, and loading and unloading products off of pallets weighing anywhere from 20 to 200 pounds. Claimant's job necessitated that he climb on and off of the forklift several times during the day.

Claimant began experiencing back problems and back pain approximately four years before the regular hearing. In early February 2000, he reported the problems to his supervisor, Jim Wilson. Claimant testified he had simply gotten to the point where he did not feel he could do the job. Claimant was referred to Sidney W. Wang, M.D., who returned him to work with restrictions, limiting lifting to a maximum of 35 pounds. Claimant presented those restrictions to respondent and talked to Carl Edward Wasinger, the manager of the distribution center. Claimant's restrictions were accommodated, and claimant was limited to only using the forklift and moving things around with the use of machinery, so that he did not have to do any lifting in violation of Dr. Wang's restrictions.

Claimant advised respondent on November 15, 2000, of his intent to resign effective November 29, 2000. Claimant currently works as a real estate salesperson at a reduced wage.

Claimant's income sheet from the real estate job indicates gross income of $426.14 per week. However, after expenses are deducted, claimant's earnings from real estate sales shows a $227-per-week average wage.

Claimant was examined by David J. Clymer, M.D., a board certified orthopedic surgeon, at respondent's request. Dr. Clymer, after reviewing x-ray films from March of 1996 and February of 2000, found minor degenerative changes in claimant's neck and mid thoracic back. Dr. Clymer also found some spurring and narrowing of the disc spaces consistent with degenerative changes. Dr. Clymer testified that claimant's condition was due to time, and wear and tear. He felt the primary factor was the age of claimant and the wear and tear over claimant's life. He did not believe claimant had any significant neurological problems or spinal instability, and felt surgery was not warranted. He opined claimant's work did not contribute much to the degenerative changes in claimant's neck, testifying that those changes are simply due to the aging process. He felt claimant's work with respondent was not a significant contributing factor to the degenerative changes and no restrictions were required. He stated there would be no restriction against driving a forklift.

Dr. Clymer assessed claimant a 5 percent whole body functional impairment based upon the conditions diagnosed, but failed to specify whether he utilized any version of the AMA Guides in rendering this opinion. He limited claimant to 50 pounds lifting, which is less strict than the 35-pound restriction placed upon claimant in February of 2000 by Dr. Wang. He also suggested claimant avoid repetitive lifting and bending.

Claimant was referred to board certified orthopedic surgeon Truett L. Swaim, M.D., by claimant's attorney. Dr. Swaim diagnosed degenerative changes as well as spondylotic changes in the thoracic spine, and arthritis and kyphotic deformity of the thoracic region. He found a compression fracture at T6 with wedging at other unspecified levels. Dr. Swaim assessed claimant an 18 percent whole body functional impairment pursuant

to the AMA Guides, Fourth Edition. Three percent was for the compression of the vertebral bodies, 2 percent for degenerative changes, 10 percent for the decreased range of motion of the thoracic region, and 3 percent for the decreased range of motion of the cervical region. He opined the compression fractures were the result of heavy and repetitive lifting, and also riding the forklift on a regular basis. He admitted that the compression fractures could be 2 weeks old or 20 years old; he had no way of knowing.

Dr. Swaim argued that even the spondylosis and the wedging could have occurred anywhere between 1996 and February of 2000. He was specific in attributing the wedging to claimant's work, however. The spondylotic changes he described as a rheumatologic factor which, in his opinion, were aggravated by claimant's work. Dr. Swaim did acknowledge that years of riding a motorcycle could have contributed to claimant's condition. Both Dr. Swaim and claimant are avid motorcycle riders.

Claimant, on more than one occasion, brought specific restrictions to respondent, which were accommodated in each instance. However, there was no indication that claimant advised respondent prior to his voluntary termination that he was unable to drive the forklift or was, in any way, restricted from driving the forklift.

Mr. Wasinger, respondent's manager for the distribution center, acknowledged that they had accommodated claimant's restrictions against lifting. Cynthia Rose Lawson, the occupational health and safety director for respondent, testified that respondent had a policy for accommodating permanent restrictions. They would turn a temporary position into a permanent position in order to accommodate the medical restrictions placed upon a person. She testified that claimant's salary would have remained the same.

Ms. Lawson testified that claimant was placed on specific lifting restrictions, which the company did accommodate. Claimant was placed as a full-time forklift driver, with no lifting required. She was not aware claimant ever asked for a position different than the forklift driving job and claimant was not restricted from driving a forklift at any time before his termination.

Ms. Lawson testified that had she been made aware that claimant could not drive a forklift, she would have been able to find a job to accommodate his restrictions and claimant would have remained with respondent at a comparable wage. She was, however, never asked to find claimant a job outside of driving the forklift.

In workers' compensation litigation, the burden of proof is on claimant to establish his right to an award of compensation by proving all the various conditions upon which that right depends by a preponderance of the credible evidence. *See* K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

In reviewing the evidence, the Board finds that the medical testimony of both Dr. Swaim and Dr. Clymer supports claimant's contentions that his employment with respondent, at the very least, aggravated his condition in his cervical and thoracic spine. Even Dr. Clymer acknowledged that claimant's employment had some effect on his degenerative condition, although he felt claimant's work did not have "much" contribution to the degenerative changes in claimant's neck. Dr. Swaim, on the other hand, found claimant's employment was a substantial contributing factor to the development of the degenerative processes in claimant's cervical and thoracic spine. He opined the compression fractures were the result of the repetitive heavy lifting and the riding of the forklift over a period of several years.

The Board finds claimant has proven that he suffered accidental injury arising out of and in the course of his employment based upon a preponderance of the credible evidence.

K.S.A. 1999 Supp. 44-510e(a) defines functional impairment as:

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Both Dr. Clymer and Dr. Swaim provided their opinions regarding claimant's functional impairment. Dr. Clymer, however, failed to mention if he utilized the AMA Guides and, if so, which edition was used. Therefore, Dr. Clymer's opinion that claimant has a 5 percent impairment to the body as a whole is not in compliance with K.S.A. 1999 Supp. 44-510e.

Dr. Swaim, on the other hand, identified the AMA Guides, Fourth Edition, as the basis for his 18 percent impairment to the body as a whole. Thus, Dr. Swaim's opinion is in conformity with K.S.A. 1999 Supp. 44-510e. The Board, therefore, finds claimant has an 18 percent impairment to the body as a whole based upon the injuries suffered while employed with respondent.

K.S.A. 1999 Supp. 44-510e defines permanent partial general disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that

> the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

In determining whether claimant is entitled to a work disability, several cases must be considered by the Board. In Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the Kansas Court of Appeals held that the Workers Compensation Act should not be construed to award benefits to a worker solely for refusing a proffered job that the worker has the ability to perform. In this instance, respondent had accommodated every restriction provided by claimant. However, when claimant was restricted from riding a forklift, that information was apparently not provided to respondent in a timely fashion.

In this instance, claimant would have been able to continue working at a comparable wage had he provided to respondent the restrictions against riding the forklift. As was verified by Ms. Lawson, it is respondent's position to turn temporary positions into permanent accommodated positions and to accommodate restrictions whenever possible. If claimant had approached her with a slip saying he could not drive a forklift, she would have been able to find an accommodated job to fit those restrictions. Claimant's failure to provide those restrictions and to provide respondent with an opportunity to accommodate them was not good faith and violates the policies set forth in Lowmaster, *supra*; *see also* Oliver v. Boeing Co., 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999). The Board, therefore, finds that claimant is limited to his functional impairment, having violated the policies of the Kansas Court of Appeals in Foulk, *supra*, Oliver, *supra*, and Lowmaster, *supra*.

The Board, therefore, finds that the Administrative Law Judge's Award, granting claimant an 18 percent whole body functional impairment, but denying him any additional work disability under K.S.A. 1999 Supp. 44-510e, should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated November 5, 2001, should be, and is hereby, affirmed and claimant is awarded an 18 percent whole body functional disability based upon the opinion of Truett L. Swaim, M.D.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of June 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director